



## LITIGATION

### THE MICHIGAN SUPREME COURT CLARIFIES THE RULES FOR RELIEVING A DEFENDANT FROM A DEFAULT JUDGMENT -- *LAWRENCE M. CLARKE, INC. V. RICHCO CONSTRUCTION, INC. ET AL.*

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Michigan Court Rule 2.612(B) authorizes a trial court to relieve a defendant from a judgment, including a default judgment, under certain circumstances. In the recent case *Lawrence M. Clarke, Inc. v. Richco Construction, Inc.*, \_\_\_ Mich. \_\_\_ (Docket No. 139394, June 30, 2011), the Michigan Supreme Court clarified those requirements, and ultimately relieved the defendants, Richco Construction, Inc. and two of its officers, from a default judgment entered after the defendants failed to respond to a complaint for breach of contract and fraud filed by Lawrence M. Clarke, Inc.

Clarke and Richco entered into a contract in 2003 for Richco to provide sewer system work for Clarke's residential subdivision construction project. When Richco's work was unsatisfactory to the governing municipality and Richco could not adequately repair the work, Clarke replaced Richco with a new sewer system contractor. Richco, meanwhile, claimed it was unpaid and recorded a construction lien.

In June of 2006, Clarke filed suit against Richco and its officers for breach of contract and fraud. But Clarke was unable to locate or serve any of the defendants as Richco had vacated its business address in Wayne County and had not left a forwarding address.<sup>1</sup> Clarke's complaint was dismissed without prejudice for failure to serve in October of 2006.

In January of 2007, Clarke re-filed its same complaint, along with a motion to allow alternative service. The trial court granted Clarke's motion and ordered that service be accomplished by (1) posting the documents at Richco's former registered address, (2) mailing the documents to Richco's officers at their former registered addresses, and (3) publishing a copy of the order in a Monroe County newspaper, which was where the residential subdivision project was located.

In October of 2007, the trial court entered a default judgment against the defendants, including damages, the cost of a bond, "contractual interest," attorney fees, and pre-judgment interest. After the default judgment was entered, Clarke finally located the defendants and seized the officers' vehicles. The defendants claimed that this was the first they became aware of the lawsuit and entry of a default judgment.

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<sup>1</sup> As noted in a concurring opinion by Justice Marilyn Kelly, Clarke failed to make use of internet search tools when attempting to locate Richco and its officers. Evidently, Richco and the individual defendants could have been located using a cursory Google search.

Just four days after the defendants became aware of the judgment, they filed an emergency motion to set aside the default judgment. The trial court denied their motion, and the Court of Appeals affirmed, finding that the defendants had "failed to file a timely affidavit in support of their motion."

The Supreme Court, however, reversed, concluding that the defendants met the requirements for relief from judgment. The Court observed that under MCR 2.612(B), a trial court may grant relief from a default judgment if "(1) personal jurisdiction over defendants was necessary and acquired, (2) defendants in fact had no knowledge of the action pending against them, (3) defendants entered an appearance within one year after the final judgment, (4) defendants show a reason justifying relief from the judgment, and (5) granting defendants relief from the judgment will not prejudice innocent third persons."

The Court found three of those requirements to be readily met: the Court assumed for purposes of its analysis that the trial court had personal jurisdiction over the defendants, and found that there was no question that the defendants timely appeared after the default judgment was entered and that granting them relief would not prejudice innocent third persons. The remaining two requirements, however – "knowledge of the action" and "a reason justifying relief from the judgment" – presented issues of first impression for the Court requiring closer examination.

#### What does the Language "In Fact Have No Knowledge of the Action" Really Mean?

As to the requirement of knowledge "in fact," the Court noted that "a difference in specificity exists" between "actual knowledge" and mere "knowledge," and that it was necessary for the Court to clarify "what is required for a party to have knowledge in fact under MCR 2.612(B)."

Observing that the phrase "in fact" is commonly defined as "[a]ctual or real," the Court held that a defendant is permitted to seek relief from a judgment under MCR 2.612(B) "as long as the defendant did not have *actual* knowledge of the pending action." The Court found further support for its conclusion in caselaw from the Court of Appeals and supplemental authority explaining that "failure to receive actual notice is sufficient to satisfy the knowledge-in-fact requirement of MCR 2.612(B)."

Applying the "actual knowledge" requirement to the case before it, the Court held that the defendants did not have actual knowledge of the lawsuit or judgment because they were never personally served. Moreover, the Court held that the methods of substituted service authorized by the trial court could not have provided the defendants



with *actual* knowledge of the lawsuit. The Court found that mailing the complaint to an address that Clarke already knew was no longer a current address was plainly insufficient, and that publication in the Monroe County newspaper was “particularly unlikely to provide defendants with actual knowledge of the action against them, given that defendants resided in Wayne County and performed the work in Monroe County in 2004 at the latest and that the advertised notice was not published in the newspaper until 2007.” Therefore, the Court concluded, Clarke’s efforts “were inadequate to provide defendants with *actual* knowledge as required by MCR 2.612(B).”

## What Qualifies as an Adequate Reason Justifying Relief From Judgment?

With respect to the requirement that a defendant show “a reason justifying relief from the judgment,” the Court noted that the “reason” need not be “mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party;” since another court rule expressly provides for relief for these reasons.

For guidance, the Court looked once again to “one of the few published opinions applying MCR 2.612(B) or its predecessor,” as well as secondary authorities, concluding that “a defendant may satisfy the requirement of a ‘reason justifying relief from the judgment’ by showing that he or she (1) did not have actual notice of the action and (2) has a meritorious defense.”

Because the defendants did not have actual notice of the action until after the default judgment was entered, the Court found the first prong of this requirement to be easily satisfied. With respect to the “meritorious defense” prong, the Court observed that the defendants had presented a meritorious defense to both the breach of contract and fraud claims. With respect to the breach of contract claim, the defendants “forcefully contested” Clarke’s damages award, which was only supported by the testimony of one Clarke employee and no documentary evidence. With respect to the fraud claim, the defendants persuasively argued that Clarke failed to plead its fraud claim with the particularity required by the Michigan court rules. Accordingly, the Court concluded that the defendants “presented facts and arguments representing meritorious defenses sufficient to satisfy the requirement of MCR 2.612(B) that the defendant show a reason justifying relief from the judgment.”

## Conclusion

The Michigan Supreme Court’s decision in *Clarke* is significant because it is the first time that the Michigan Supreme Court has addressed the requirements for seeking relief from a default judgment under MCR 2.612(B). Clients with questions about overturning a default judgment entered against them should consult with counsel to determine how the *Clarke* decision may affect their case.

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